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No. 85-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, *et al.*,

Appellants,

—v.—

DON AGUILLARD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLEES

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QUESTION PRESENTED

In *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968), this Court declared unconstitutional a purportedly secular state law which, "tailored to the principles" of Fundamentalist faith, outlawed the teaching of the theory of evolution in public schools. Louisiana has now enacted a law outlawing the teaching of the theory of evolution in public schools unless accompanied by instruction in a newborn "science" tailored to the principles of the same Fundamentalist faith. Hence, this particular case, as the Fifth Circuit aptly said (765 F.2d 1251, 1253), "is a simple one, subject to a simple disposal"—an affirmative answer to this question:

Did the courts below correctly grant summary judgment that sections 286.1 through 286.7 of Louisiana's General School Law violate the Establishment Clause by forbidding public schools to teach the scientific theory of evolution unless accompanied by instruction in "creation-science"?*

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* A listing of the parties appears on the first page of the Brief of Appellants. No corporate parents, subsidiaries or affiliates of those parties are known to appellees.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	iii
Table of Authorities	v
Statement of the Case	3
The Creationism Act	4
The Legislative History	6
The Administrative History	20
The Litigation History	21
Summary of Argument	22
Argument	23
I. THE CREATIONISM ACT VIOLATES THE ESTABLISHMENT CLAUSE	23
A. The Purpose of the Creationism Act Is To Endorse a Religious Belief	24
1. The Creationism Act Expressly Endorses a Religious Belief	25
2. The Creationism Act Lacks a Legitimate Secular Purpose	32
3. The Creationism Act Was Intended To Endorse a Religious Belief	35

PAGE

B. The Effect of the Creationism Act Is To Endorse a Religious Belief 37

C. The Creationism Act Excessively Entangles the State and Religion 40

II. THE COURTS BELOW PROPERLY GRANTED SUMMARY JUDGMENT 42

Conclusion 45

TABLE OF AUTHORITIES

Cases: PAGE

Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963) 23, 27, 31, 32, 41

Anderson v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986) 42

Bingham v. *Commissioner*, 325 U.S. 365 (1945) 43

Board of Educ. v. *Allen*, 392 U.S. 236 (1968)..... 44

Bradfield v. *Roberts*, 175 U.S. 291 (1899) 44

Braunfeld v. *Brown*, 366 U.S. 599 (1961)..... 44

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 23

Celotex Corp. v. *Catrett*, 106 S. Ct. 2548 (1986)..... 42

Committee for Pub. Educ. v. *Nyquist*, 413 U.S. 756 (1973) 37, 44

Crowley v. *Smithsonian Institution*, 636 F.2d 738 (D.C. Cir. 1980) 28

Daniel v. *Waters*, 515 F.2d 485 (6th Cir. 1975)..... 4, 32

Davis v. *Beason*, 133 U.S. 333 (1890) 27

Davis v. *Page*, 385 F. Supp. 395 (D.N.H. 1974) 32

Engel v. *Vitale*, 370 U.S. 421 (1962).....23, 30, 31, 44

Epperson v. *Arkansas*, 393 U.S. 97 (1968) .....i, 3, 24, 31, 35, 43

Grand Rapids School Dist. v. *Ball*, 105 S. Ct. 3216 (1985) 38

Healy v. *James*, 408 U.S. 169 (1972)..... 33

Hendren v. *Campbell*, No. S577-0139 (Ind. Super. Ct. Apr. 14, 1977) 4, 12, 28

Jay v. *Boyd*, 351 U.S. 345 (1956)..... 43

Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952)... 35

PAGE

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) . . . 33

Lane v. *Wilson*, 307 U.S. 268 (1939) 32

Larkin v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) 44

Larson v. *Valente*, 456 U.S. 228 (1982) 44

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) . . . 24, 34, 39, 41, 44

Lynch v. *Donnelly*, 465 U.S. 668 (1984) 25, 32, 35, 43

McCollum v. *Board of Educ.*, 333 U.S. 203 (1948) 24, 31

McLean v. *Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982) 4, 12, 14, 28, 32, 42, 44

Malnak v. *Yogi*, 592 F.2d 197 (3d Cir. 1979) 31

Marsh v. *Chambers*, 463 U.S. 783 (1983) 41

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) 42

Meek v. *Pittenger*, 421 U.S. 349 (1975) 39, 41

Mueller v. *Allen*, 463 U.S. 388 (1983) 44

New York v. *Cathedral Academy*, 434 U.S. 125 (1977) . . 44

New York Trust Co. v. *Eisner*, 256 U.S. 345 (1921) 35

Quick Bear v. *Leupp*, 210 U.S. 50 (1908) 44

Reynolds v. *United States*, 98 U.S. 145 (1878) 35

Richards v. *United States*, 369 U.S. 1 (1962) 43

Roemer v. *Board of Pub. Works*, 426 U.S. 736 (1976) . . 32

Shelton v. *Tucker*, 364 U.S. 479 (1960) 24

Sloan v. *Lemon*, 413 U.S. 825 (1973) 44

Stone v. *Graham*, 449 U.S. 39 (1980) 31, 32, 36, 43

Thornton v. *Caldor, Inc.*, 105 S. Ct. 2914 (1985) 24

PAGE

Tinker v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) 32

Torcaso v. *Watkins*, 367 U.S. 488 (1961) 27, 44

United States v. *Seeger*, 380 U.S. 163 (1965) 27

Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 36

Wallace v. *Jaffree*, 105 S. Ct. 2479 (1985) 24, 25, 27, 31, 33, 35, 37

Walz v. *Tax Commission*, 397 U.S. 664 (1970) 44

Widmar v. *Vincent*, 454 U.S. 263 (1981) 44

Wieman v. *Updegraff*, 344 U.S. 183 (1952)..... 33

Williams v. *Board of Educ.*, 388 F. Supp. 93 (S.D. W.Va.), *aff'd mem.*, 530 F.2d 972 (4th Cir. 1975) 32

Wright v. *Houston Indep. School Dist.*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) 4

Zorach v. *Clauson*, 343 U.S. 306 (1952) 30, 44

Constitutional Provisions, Statutes and Rules:

U.S. Const., amend. I 23

La. Rev. Stat. §§ 17:261-281..... 4

La. Rev. Stat. §§ 17:286.1-286.7 ..... *passim*

Fed. R. Civ. P. 56(c)..... 42

12 Hening's Stat. 84..... 35

Other Authorities

13 Am. Law Institute, *Proceedings* (1937) 25

PAGE

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N. Eldredge, *The Monkey Business: A Scientist Looks at Creationism* (1982) 3

"Fossils of 'Man Tracks' Shown to be Dinosaurian," *N.Y. Times*, June 17, 1986, at C3, col. 1 39

Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L.J. 515 (1978) 28

2A Singer, *Sutherland Statutory Construction* (Sands 4th ed. 1984)..... 43

State of Maryland, Office of Atty. Gen. (Feb. 23, 1982) 4

State of Oregon, Dep't of Justice, 42 Op. Atty. Gen. 44 (1981) 4

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Webster's Third Int'l Dictionary Unabridged (1981) 25, 26

A.N. Whitehead, *Science and the Modern World* (1925) 45

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BRIEF OF APPELLEES

The Balanced Treatment for Creation-Science and Evolution-Science Act, La. Rev. Stat. §§ 17:286.1-286.7, known as "The Creationism Act," is a law respecting an establishment of religion.

The religion is the belief in the literal truth of the Book of Genesis. To adherents of this faith, the universe is the exclusive handiwork of an almighty God, who created all living things in the forms in which they now appear. These faithful find offense in any theory of science inconsistent with this Biblical account. No product of human thought, no area of learning, so affronts this deeply-held religious conviction as does the scientific theory of evolution.

The Creationism Act endorses this religious belief. The law does so (1) by requiring Louisiana public schools to provide instruction in an inescapably religious belief in creation—which the statute renames "creation-science"—or (2) by forbidding instruction in the scientific theory of evolution without equal instruction in "creationism." The purpose of the statute, and its effect, are to achieve one of two results: (1) the pedagogic juxtaposition of a scientific theory with a divine explanation of the universe, or (2) the elimination from the classroom of that scientific theory solely because of the theory's disharmony with a religious belief. Neither result can be reconciled with the Establishment Clause.

No profession of secular purpose, no incantation of the word "science," can make the religious content of the Creationism Act disappear. The law compels—not instruction in all available scientific facts (before the law, teachers were free to teach all the facts)—but instruction in facts "and inferences" consciously assembled as "evidences for" the specific religious conclusion of creation, without which no mention of evolution is permitted. The Act does not serve, instead it subverts, the stated legislative purpose of advancing academic freedom. A century of Fundamentalist hostility to evolution, the expressions of that hostility in the legislative history, and simple common sense, only confirm a religious content that the statute manifests.

We are not here to defend the theory of evolution, nor to attack those who hold a religious explanation of creation. We are not here to assert limits on the data science may consider in attempting to explain nature, nor to claim that science is the only valid means by which humans may understand the universe. Our contention here, instead, and the holdings below, are narrow: The Creationism Act is intended and is perceived to convey a message of endorsement for a particular religious belief about the origins of the universe, and a State is not permitted to make such an endorsement.

Nothing so powerfully expresses a State commitment to a religious belief as the use of public schools for religious instruction. The Establishment Clause forbids political power to be used to enshrine a particular religious belief in public schools, to cleanse the classroom of learning unpalatable to one faith, or to place before young students an imagined rivalry between science and Scripture. The courts below correctly so held. This Court should affirm.

STATEMENT OF THE CASE

The invention of "creation-science," and the passage of the Creationism Act, are but the latest chapters in a struggle by Biblical literalists to banish evolution from the classroom. In the first part of this century, faced with growing acceptance of the theory of evolution in the scientific community, Fundamentalists prevailed upon state legislatures to forbid any instruction in evolution. These efforts culminated in the celebrated *Scopes* trial, a failed attempt to challenge anti-evolution laws. It was not until a nationwide, Sputnik-inspired concern with science education, and this Court's rulings in cases such as *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), that the schoolhouse door was fully opened to evolution theory. *See* N. Eldredge, *The Monkey Business: A Scientist Looks at Creationism* 14-16 (1982).

These developments did not daunt the literalists, for soon they returned with Genesis repackaged as "scientific creationism." Early incarnations of this "science" explicitly relied on the Book of Genesis as the authoritative source for "creationism." When the courts rejected early attempts to place this "science" into the public schools, explicit reference to Genesis was dropped from the creationist vocabulary. Subsequent efforts to place "creationism" into public schools were aborted in three states by opinions of state attorneys-general that instruction in the subject would violate the Constitution. Such efforts found success, however, with the enactment of "creationism" laws, first in Arkansas—a law held unconstitutional

in a ruling the State did not appeal (*McLean* v. *Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982))—and then in Louisiana.[1]

The Creationism Act

The Creationism Act became law on July 20, 1981, when the Governor of Louisiana signed legislation adding sections 286.1 through 286.7 to the State's General School Law. The new sections appear among other provisions prescribing courses of study in Louisiana's public schools. These other provisions, similar to those in most states, require instruction in such topics as health and civics, driver training and free enterprise. None defines theories within a particular science, none mandates equal time for opposing opinions within a specific area of learning. *See*, *e.g.*, La. Rev. Stat. §§ 17:261-281.

Thus is the Creationism Act unique. The law juxtaposes two supposed "models" on the origin of the universe, for which the statute coins the terms "creation-science" and "evolution-science." La. Rev. Stat. § 17:286.3. "Commencing with the 1982-1983 school year," the statute says, "public schools" in Louisiana—defined to mean public elementary and secondary schools—"shall give balanced treatment to creation-science and to evolution-science." *Id.* § 17:286.4A; *see id.* § 17:286.3(4). The requirement is all-or-nothing: Neither of the putative "sciences" need be taught, but the law forbids the teaching of evolution without "balanced treatment" for "creation-science." *Id.* § § 17:286.5. Each individual school in the State must decide—apparently on an annual basis—whether to provide any instruction. *See id.* §§ 17:286.4-.286.6.

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1 Early attempts to place "creationism" in the classroom are described in *Daniel* v. *Waters*, 515 F.2d 485 (6th Cir. 1975), and in *Hendren* v. *Campbell*, No. S577-0139 (Ind. Super. Ct. Apr. 14, 1977); *see also Wright* v. *Houston Indep. School Dist.*, 366 F. Supp. 1208, 1211 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974). The opinions of state attorneys-general are: State of Maryland, Office of Atty. Gen. (Feb. 23, 1982); State of Oregon, Dep't of Justice, 42 Op. Atty. Gen. 44 (1981); *id.* 41 Op. Atty. Gen. 281 (1980); State of South Carolina, Office of Atty. Gen. (Nov. 8, 1979).

"Balanced treatment" means equal weight. If a school elects to teach anything about the origins of life, each teacher must provide "whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories in view of the textbooks and other instructional materials available for use in his classroom." *Id.* § 17:286.3(1). The science classroom is not the only venue where this obligation arises: Balanced treatment must pervade all aspects of school life—from a biology lecture to an English lesson, from the library shelves to the physics laboratory, from Copernican theorems to Milton's "Paradise Lost"—which deal in any way with the origins of the universe:

> Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe. *Id.* § 17:286.4A.

The statute's definition of "creation-science" indulges tautology. The term, the law says, means "the scientific evidences for creation," but the statute is silent on the meaning of "creation," and leaves unidentified the "evidences" the teacher may invoke to support "creation." La. Rev. Stat. § 17:286.3(2). The term "creation-science" also embraces whatever "inferences" from the "evidences" the teacher may choose to draw. *Id.* Nothing in the Creationism Act restricts the inferences the teacher may include in a lesson on the topic—on the identity of the Creator or the powers the Creator brought to bear—except only that the teacher may not characterize any such inferences as "proven scientific fact." *Id.* § 17:286.4A.

As between "evolution-science" and "creation-science," the Creationism Act evinces its preferred "model." Thus, the statute requires each school board to develop curriculum guides on "creation-science," but says nothing of comparable guides for evolution. La. Rev. Stat. § 17:286.7A. The statute establishes a seven-member panel to supply "resource services" on "creation-science," but no corresponding services promote evolution. *Id.* § 17:286.7B. Only "creation-scientists," and not persons who accept the theory of evolution, may serve on this seven-member panel. *Id.* And the Creationism Act forbids school boards to discriminate against anyone who "chooses to be a creation-scientist" or to teach "creationism," but contains no protection for those who choose otherwise or who refuse to teach the subject. *Id.* § 17:286.4C.

The Creationism Act nevertheless takes pains to posit a secular legislative intent. According to its terms, the legislation was "enacted for the purposes of protecting academic freedom." La. Rev. Stat. § 17:286.2. The statute does not elaborate. The legislative history shows why.

The Legislative History

No clamor for liberty among Louisiana teachers marked the conception of the Creationism Act. No law prohibited the teaching of any scientific theory; teachers were free to tutor students on all natural phenomena and on all the ways science explained those phenomena. No suggestion appeared that students produced by Louisiana's school system fared poorly on tests, or departed the system ill-equipped to pursue further studies or begin a career. No recent discovery of nature caused legislators to wonder whether pupils were receiving instruction in the latest developments in science and the humanities. No instructor in Louisiana's public elementary or secondary schools, nor apparently any graduate of those schools, came forward to lament the inadequacy of Louisiana's school system or to complain of restrictions on teachers' freedom to educate.

The Creationism Act has its roots, instead, in Senate Bill 956, which State Senator Bill Keith introduced during the 1980 session of the Louisiana legislature. This bill, like its offspring which was enacted, contrasted two "theories" of the origin of the universe; it labeled them "evolution" and "creation *ex nihilo*," and proposed that each be given equal weight in Louisiana classrooms. The bill's definition of "creation *ex nihilo*"—a term Senator Keith used interchangeably with "scientific creationism" (JA E2)—was overtly religious:

> 'Theory of creation ex nihilo' means the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created ex nihilo and fixed by God. (JA E1a-1b.)

This version of the Creationism Act, like the final one, claimed the protection of "academic freedom" as its sole objective. (JA E1.) A peril to academic freedom first occurred to him, Senator Keith explained to a legislative committee, when he learned that his son's science instructor, having asked the boy to recite a homework assignment on evolution, found unsatisfactory the response that "God created the world and God created man." (JA E74-75.) This experience convinced the Senator that teaching evolution amounted to instruction in the "bona fide religion" of "secular humanism," and thereby undermined belief in the Bible. (JA E37.) Opening the initial hearings on his bill before the Senate Education Committee on June 19, 1980, the Senator urged that "it is wrong and unconstitutional to teach only secular humanism in our public schools and therefore, my request today is that we teach both scientific creationism alongside evolution." (JA E4.)

This vision of "academic freedom"—that students must be enlightened on, and be free to choose between, not two *scientific* theories but two supposedly conflicting *religious* beliefs—permeates the legislative history of the statute. Advocating the Keith bill at the first hearings, the lead witness

proclaimed that neither evolution nor creationism "is truly a scientific theory," and explained that "creation-science," like Genesis, "postulates that everything was created by some intelligence or power external to the universe" in a way that all living organisms "were functionally complete when created including man." (JA E6, 9.) Other proponents likewise contrasted the two "theories" and dubbed the choice between the two a "personal" one. (JA E21, 23.) One witness lauded the benefits of instructing the young that Adam, not an ape, was their progenitor:

> I think if you teach children that they are evolved from apes, then they will start acting like apes. If we teach them possibly that they were created by an Almighty God, then they will believe that they were a creature of God and start acting like one of God's children. (JA E25.)

The testimony at follow-up hearings into "scientific creationism"—conducted on November 25, 1980 pursuant to a Senate study resolution of the previous June 24—amplified this theme. Advocates of the Keith proposal portrayed the theory of evolution as "conjecture" and a "myth" steeped in "demagoguery," productive of "frauds," offensive to "the dignity of man," and redolent of "atheistic theories" and "humanistic implications." (JA E66, 67, 79, 80, 99.) Arguing that evolution is incapable of proof because no one was there to see it, proponents insisted that any instruction on the origins or development of humanity is necessarily "beyond the realm of science" and "cannot be scientific." (JA E85.) Rather, "any teaching on how man got here," the creationists explained, "has tremendous connotations" about "what we all believe" and "how we should live our lives." (JA E65, 66, 67.) Instruction in the "creationist" point of view was essential to infuse human conduct with the fear of God:

> Men generally don't want to face the fact that there might be a [C]reator. We are bothered by it because we are not related to Him properly. We are threatened by the fact that there might be a [C]reator to whom we have to

> answer to [sic]. That means that when death comes, there is something after that and the very thought of it is repulsive to most people. So, for the evolutionary view to be u[p]held in the school system by our educators, it is a very comfortable one because we do not have to think about a [C]reator and what our responsibility is to Him. (JA E82-83.)

According to the creationists, a conspiracy to supplant Genesis with "secular humanism" explained the widespread acceptance of evolution theory. One self-styled "creation-science researcher" (JA E127)—Dr. Edward Boudreaux, a leading expert on the subject, in Senator Keith's view (JA E424)—opined in a statement to the legislative committee that antagonism to the word of God motivated not only Darwin's research, but also all subsequent consideration of that research:

> The problem is that all these people [who were Darwin's associates] were professed atheists whose views of life were governed by social humanism. Hence, Darwin's purpose was not at all one of objective science, but rather to initiate a doctrine that appealed to the human intellect, to man's egotistical egocentricity and contrary to [B]iblical teaching. Economic and social conditions in Europe during Darwin's time were ripe for precisely such a doctrine as Darwinism.
>
> Subsequent to Darwin's time, many more people who were strongly influential in key scientific circles took up Darwin's cause for precisely the same reason as Darwin had originally intended. The whole issue ultimately escalated to the point that a large majority of scientists were 'brainwāshed' into accepting evolution as a proven theory with overwhelming data in support of it. (JA E128-29.)

The antidote for this "brainwashing," the witnesses proposed, was in teaching that the origins of life and the universe required "the direct involvement of a supernatural intelli-

gence" which "takes faith to accept." (JA E154.) The witnesses' efforts to lend content to this new discipline involved examining the body of science for fragments to support the inerrancy of Genesis. Thus, the summary of "evidences" for creation submitted to the legislative committee by proponents of the bill provided that "matter cannot create itself, so there must have been an act of creation"; that creation must have been "relatively recent" based on certain methods for dating the rate of decay in radioactive material; that no "missing links" have been found between man and ape, "so man and apes must have been specially [simultaneously] created"; that interstices in fossil records demonstrate the "[f]ixity [unchanged nature] of original plant and animal kinds" at creation; and that a "world-wide flood" fully explains the earth's geology. (JA E182, 185, 186, 188, 189.)

Advocates of the bill attacked not only evolution theory but the whole of science; the legislative hearings revealed that no area of human thought—not physics, biology, mathematics, geology nor astronomy—was immune from assault for inconsistency with faith in divine creation: For example, astronomy's measure of the distance of stars—that their light reaches Earth after thousands of years—overlooks the Creator's ability to produce "apparent age" to complement recent creation. (JA E579-80.) Einstein's theory of relativity is not an "absolute theory to fit every situation," and thus of no use to explain the origin of the universe by a Creator. (JA E133.) The geological dating of fossil records is "ridiculous" and made "totally meaningless" by the "forces and pressures" which a "worldwide flood (as described in the Bible at the time of Noah)" occasioned. (JA E145-46.)

That these tenets of "creation-science" bear a striking resemblance to a literal view of Genesis is no accident. The witnesses who advocated the Creationism Act—among them, a Bible instructor, a parochial school teacher (no public school teacher testified for the bill), and representatives of a "Christian political action" group known as the Pro-Family Forum—indicated, as did Senator Keith, that the two authoritative

sources on "creation-science" are the Institute for Creation Research and the Creation Research Society. (JA E76, 165, 277, 503-04.) The publications on which Senator Keith relied, the "thousands" of creation-scientists to whom he referred, the assembly of "evidences" purporting to support "creation-science," and the only textbooks on "creation-science" cited in the legislative record, are products of these two organizations. (JA E76, 182, 190, 202, 277.)

The Institute for Creation Research is an affiliate of the Christian Heritage College in San Diego, California. According to a brochure placed in the legislative record by advocates of the bill, the Institute was established to address the "urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give account." (JA E197.) The vehicle of such deliverance, the Institute believes, is "a revival of belief in special creation as the true explanation of the origin of the world," toward which end the Institute concentrates on the "development of new methods for teaching scientific creationism in public schools." (JA E197, 199.) A witness at the legislative hearings quoted the Institute's director:

> It is high time that Christians face the fact that the so-called geologic ages are essentially synonymous with the evolutionary theories of origins. The latter in turn is at its ultimate roots, the anti-God conspiracy of Satan himself. (JA E584.)

The Creation Research Society, located in Ann Arbor, Michigan, is likewise a forum of Fundamentalist belief. Applicants to membership in the Society must subscribe to the statement that "[t]he Bible is the written word of God, and because it is inspired throughout, all of its assertions are historically and scientifically true." (JA E583.) To pursue studies in "creation-science" at the Society, in consequence, a person must accept "that the account of origins in Genesis is a factual presentation of simple historical truth." (*Id.*) The Society requires adherence to the convictions that all living things "were made by

direct creative acts of God during Creation Week as described in Genesis," that the "account of the special creation of Adam and Eve as one man and one woman" is true, and that "the great Flood described in Genesis" was a "historical event." *McLean* v. *Arkansas Bd. of Educ.*, *supra*, 529 F. Supp. at 1260 n.7.

Joining these organizations in the promotion of "creationism" was a South Carolina therapist named Paul Ellwanger, the author of a so-called "model bill" to "balance" instruction in the theory of evolution with equal doses of "creation-science." On August 5, 1980, Ellwanger, styling himself the "national coordinator" of the movement for such "balanced treatment," sent a copy of his "model bill" to Senator Keith.[2] (JA E749.) Ellwanger described the proposal as a "once-in-a-lifetime opportunity for redress of a grievance over two generations standing." (JA E751.) In the correspondence that ensued, Ellwanger alerted the Senator that Satanic forces would oppose the legislation:

> I view this whole battle as one between God and anti-God forces . . . . [T]he crux of the matter is that if evolution is permitted to continue with its monopoly in public education, then, in effect, it will continue to be made to appear that a Supreme Being is unnecessary, for it will be noted that while evolution is embraced by theistic and atheistic evolutionists, creation poses a death threat to one of those religious positions—atheism. So it behooves Satan to do all he can to thwart our efforts and confuse the issue at every turn. (JA E763-64.)

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2 The Ellwanger/Keith correspondence is part of the record in this case (JA E749-74), but not of the formal legislative history. Appellants do not dispute the correspondence; indeed, they rely on it here (Br. 40-41). Our descriptions of the two creationist organizations and of Mr. Ellwanger's activities are drawn in part from the formal legislative history and in part from the district court's decision striking down the Arkansas statute, *McLean* v. *Arkansas Bd. of Educ.*, *supra*, 529 F. Supp. at 1259-62; *see also Hendren* v. *Campbell*, *supra*, No. S577-0139 (Ind. Super. Ct. Apr. 14, 1977).

Ellwanger coached the Senator in the language and tactics necessary to win his battle. While noting that "scientific creationism" is "an integral and necessary part of the bill," Ellwanger warned against the "promiscuou[s]" use of that term and other "semantical booby-traps" which "tend to muddy the waters with the issue of Church and State." (JA E758, 763.) Cautioning, too, that "[i]t does the bill effort no good to have ministers out there in the public forum" supporting the proposal, he advised that, "[i]f you have a clear choice between having grassroots leaders of this statewide bill promotion effort to be ministerial or non-ministerial, be sure to opt for the non-ministerial." (JA E764-65.) The religious leaders, he wrote, ought to work "behind the scenes" to promote the bill with "organizational and P.R. initiatives." (JA E765.) Particular efforts should be directed at Fundamentalists who had abandoned the public schools for parochial institutions:

> They [the Fundamentalists] must be made to realize how unconscionable it is for us to allow our Christian tax dollars (and *theirs*) to be used to brainwash captive public school students in a belief system that denies the existence of God by implication and that disallows the student from ever learning about the tremendous scientific case for creation. The home, the churches and ministers, and the average lay person are just not equipped to impart that kind of knowledge. They aren't even bothering to impart the knowledge they have—about what page one of the Bible has to say about this subject. (JA E773-74.) (Emphasis in original.)

Senator Keith was an attentive pupil. At subsequent hearings on his proposal before the Senate Committee on Education on May 21 and 28, 1981, and before the House Committee on Education on June 25, 1981, the Senator "opt[ed] for the non-ministerial" approach. The Senator told the Senate Committee that he "could have produced 3000 pastors" to endorse his bill, but had decided not to do so. (JA E417.) The Senator instead relied on the testimony of Dr. Boudreaux, a member of

the Creation Research Society, who in turn relied on the Creation Research Society Quarterly. (JA E321, 327, 501.)

First, however, on April 20, 1981, Senator Keith formally introduced the Ellwanger "model bill" as Senate Bill 86. (JA Eviii.) The new bill—substantially identical to the model law enacted in Arkansas, which Ellwanger had also supplied (*McLean* v. *Arkansas Bd. of Educ.*, *supra*, 529 F. Supp. at 1261)—proposed to require public schools to provide "balanced treatment" to "creation-science" and "evolution-science." (JA E290.) The bill once again specified "academic freedom" as its purpose, but expanded on the causes of legislative concern:

> This Chapter is enacted for the purposes of protecting academic freedom for the differing values and beliefs of students, ensuring neutrality toward the diverse religious convictions of students, ensuring freedom of religious exercise for students and their parents, guaranteeing freedom of belief and speech for students, preventing establishment of theologically liberal, humanist, non-theist, or atheist religions, preventing discrimination against students on the basis of their personal beliefs concerning creation and evolution, and assisting students in their search for truth. (JA E292.)

The Senate Committee decided to delete all but the first eleven words of this provision, but the amendment was not intended to detract from the religious content of the bill. To the contrary, the amendment came as part of a proposal to delete "all references . . . in the bill to religion," *in particular* a provision which would have prohibited the use of religious writings in teaching "creation-science." (JA E440-41.) A legislative supporter of the bill had expressed concern that teachers would be unprepared to give instruction in the new "science" of "creationism," for under the model bill they "can't even refer to the [G]ospel." (JA E330.) Thus, the "main purpose" of the amendment, its sponsor explained, was to eliminate the "severe restrictions" prohibiting "reference to the [B]ible or any other religious text." (JA E441.)

The Ellwanger "model bill" also contained "findings of fact" about the current state of teaching in Louisiana public schools on the origins of life and the universe. (JA E293-97.) These findings, too, were deleted by the Senate Committee, on the ground that the findings were "arguments" in support of the bill and thus not "proper" to place in the legislation itself. (JA E319.) But the deleting amendment, its sponsor stressed, was "not meant to hurt the intent of this legislation whatsoever." (JA E320.) The deleted findings identified evolution theory as the illness the statute hoped to cure:

> Evolution-science is contrary to the religious convictions or moral values or philosophical beliefs of many students and parents, including individuals of many different religious faiths and with diverse moral values and philosophical beliefs.
>
> Public school presentation of only evolution-science without any alternative model of origins abridges protections of freedom of religious exercise and of freedom of belief and speech guaranteed by the United States Constitution for students and parents because it undermines their religious convictions and moral or philosophical values, compels their unconscionable professions of belief, and hinders religious training and moral training by parents.
>
> Public school presentation of only evolution-science furthermore abridges the prohibition against establishment of religion contained in the United States Constitution because it produces hostility toward many theistic religions and brings preference to theological liberalism, humanism, nontheistic religions, and atheism, in that these religious faiths generally include a religious belief in evolution. (JA E294-95.)

The "model bill" also contained a more precise definition of "creation-science" which, like the legislative hearings on the subject, confined the "science" to evidences which support the account of creation set forth in Genesis:

> 'Creation-science' means the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related inferences that indicate: (a) sudden creation of the universe, energy, and life from nothing; (b) the insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (c) changes only within fixed limits or originally created kinds of plants and animals; (d) separate ancestry for man and apes; (e) explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and, (f) a relatively recent inception of the earth and living kinds. (JA E298-99.)

In deleting all but the first sentence of this definition from the final bill, the Senate Committee took pains to emphasize that the omission was "intended to try to produce some good for the bill and not intended to try to gut it in any way." (JA E432.) The sponsor of the amendment regarded the excess language as "verbiage" which might be misinterpreted as an "all inclusive list" and which could be eliminated without "do[ing] any violence to the bill." (JA E437-38.) Senator Keith, who did not oppose this amendment (or the others described above), agreed that the shorter definition did not alter the meaning of "creation-science" as set forth in the model bill: During the Committee deliberations, he cited the Arkansas "creationism" statute—which retained the model bill's more inclusive definition of "creation-science"—as precedent for the type of instruction his proposal contemplated. (JA E333, 419.)

Throughout the deliberations on the Creationism Act, the Louisiana legislators recognized that the bill concerned "an extremely controversial subject matter" and "one that's very emotional." (JA E451.) The controversy and emotion stemmed, not from a quarrel over the distance of stars or the ages of rocks, but from profoundly religious matters of faith and meaning. The voices of legislators who supported the bill echoed a century of Fundamentalist antagonism to evolution:

Either we need to take the teaching of the religion of secular humanism out of our public schools and teach neither or we need to teach both. (JA E37-38.)

* * *

[The public schools] teach psychology, sociology, separate and apart from what God would proclaim as the Christian philosophy and although I think that evolution is what everyone speaks to, . . . if you followed your [Sen. Keith's] theory, your direction throughout the education system, you would have to teach two sides in every course in school. . . . I personally would like to see it done. (JA E70-71.)

* * *

Just as the Greeks as learned as they were, clung for centuries to the idea of their Gods. Their Gods were myths and they symbolize much more than the stories do. I think in the case of evolution, we have a 20th Century myth that is a symbol of something. It is more than just a scientific explanation of the way something happens. It carries a great deal of symbolism. A great deal of philosophy is taught through the teaching of evolution. (JA E96.)

* * *

[I]t is my understanding that there are only two basic concepts for the origins. One concept is that a creator however you define a creator was responsible for everything that is in this world. (JA E280.)

* * *

If you believe that a creator formed the universe. Did the creator do it, is this secret. Did he leave no evidences whatsoever in science that would point to his work? (JA E281.)

* * *

[W]hat we have in the schools in Louisiana today is a form of religion being taught that advances those religions that hold evolution as one of the tenets of their religion. And these people from the scientific community knows [sic] what religions those are. (JA E282.)

* * *

[O]ur public school children are being molested by secular humanism . . . [Y]ou will find that the cardinal principle of religious humanism, secular humanism, theological liberalism, and aetheistism [sic], the cardinal principal [sic] or the cardinal doctrine of those teachings is evolution. (JA E312-13.)

* * *

There are two religions in this world and secular humanism is one of them. . . . [A]nd I would only remind you gentlemen that evolution is the cornerstone of that religion. (JA E418.)

* * *

[G]overnment has established religion in our public schools, and it's the religion of secular and religious humanism. (JA E499.)

* * *

It is almost obvious that you make monkeys out of men, but you can't make men out of monkeys. (JA E531.)

* * *

[Y]ou said that science does not and will not ever concern itself with God or the concept of God. I don't really understand that. If there is a God, and [H]e exists, that will be a fact, will it not, a scientific fact? If [H]e does not, that would seem to be a scientific fact as well. (JA E561-62.)

* * *

> [A]nd I don't understand why these beliefs of the religious man or the man who has religious ideas, they can be tested, subjected to scrutiny, and you can write the conclusions accordingly. (JA E610.)

The public that heard these voices could not mistake the focus of the controversy. The press portrayed the debate as "God vs. Apes," and the proposal as one "to give God equal time." (JA E871.) Headlines noted "Christian groups seek reform" to "run government by the Bible," awaiting word "on 'the [B]eginning'." (JA E853, 885.) Division over the law appeared on the editorial pages and in the comments of readers. (JA E881, 894, 897.) Legislators were quoted to fear the "political suicide" of opposing a law favored by religious groups, and of having "to explain to his constituency that he voted against God." (JA E856, 889.)

To ease this tension, the Senate Committee, over Senator Keith's vehement opposition, further amended the bill to remove language requiring balanced treatment and to substitute language merely permitting such treatment. (JA E455.) Stressing that "I'm not against religion," the sponsor of this amendment argued that to make the bill permissive rather than mandatory would allow instruction in "creation-science" "without disrupting the system." (JA E361.) Senator Keith insisted that the amendment would make the bill "absolutely worthless" because "many, many science teachers have never been trained in any other area than in evolution," which is "a very strong religion with them." (JA E357.)

On June 2, 1981, the State Senate adopted the permissive version of Senate Bill 86, but, on June 25, the House Committee on Education restored the language compelling balanced treatment. The full House adopted this version on July 6, and the full Senate concurred two days later. The Governor signed the bill on July 20. (JA Exv.)

The Administrative History

In August 1981, the State Department of Education established a task force to study implementation of the Creationism Act. This task force developed a questionnaire to be sent to all local school superintendents in the state—the individuals charged with administering the law—to determine their understanding of the statute, of the content of "creation-science," and of the likely reaction of the local school boards to the all-or-nothing requirement of balanced treatment. (JA E782.)

The responses etched in sharp relief the perception that the Creationism Act required instruction in religion. Asked to interpret the statute's definition of "creation-science," only 9% gave an answer the Department classified as the purportedly nonreligious one, and the largest segment (40%) interpreted "creation-science" to mean the literal interpretation of Genesis. (JA E799, 811.) The superintendents indicated that church groups headed the list of those who had inquired about the school board's plans to implement the Act. (JA E800.) Only slightly more than a third of the school boards had decided to proceed with "balanced treatment"; another third indicated that they had elected to drop all instruction on evolution rather than to teach "creationism," and the remainder were undecided. (JA E802-03.)

Those planning to teach "creation-science" faced one basic obstacle. It appears that all known publications on "creation-science"—even those purporting to be for public schools—are replete with religious content: In the litigation that followed enactment of the law, the State admitted that no "existing books, documents or other materials" on "creation-science" are suitable for use in public school courses.

The Litigation History

The State's admission came in an action filed before this one—discovery in the earlier action was made a part of the record below on appellants' motion—in which Senator Keith and others, represented by the State Attorney General, sued the Louisiana Department of Education asking for a declaratory judgment that the Creationism Act was constitutional.[3]

On December 3, 1981, individual Louisiana public school teachers, parents of children attending those schools, and certain others commenced the present action in the Eastern District of Louisiana. The pleadings asked for an injunction prohibiting defendants—appellants, plus the Louisiana State Board of Elementary and Secondary Education ("the State Board") and the Orleans Parish School Board, both of which later realigned as plaintiffs—from enforcing the Creationism Act. The district court (Duplantier, J.) stayed this suit pending outcome of the *Keith* action.

After the *Keith* suit was dismissed for lack of jurisdiction, 553 F. Supp. 295 (M.D. La. 1982), Judge Duplantier held that the Creationism Act violated the Louisiana Constitution by usurping the State Board's right to devise curricula. The Louisiana Supreme Court, to which the Fifth Circuit certified that issue on appeal, disagreed with Judge Duplantier, 440 So. 2d 704 (La. 1983), and so the case returned to the district court, 720 F.2d 676 (5th Cir. 1983) (mem.).

On January 10, 1985, Judge Duplantier granted summary judgment that the Creationism Act violated the Establishment Clause. Noting the "over one thousand pages" of memoranda and affidavits appellants produced "on collateral issues," the court "decline[d] to put the people of Louisiana to the very considerable needless expense" of a "protracted trial." The statute, the court ruled, "is not ambiguous," and "involves

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3 The State's admission regarding the absence of textbooks appears in a deposition taken in the *Keith* action, L. Touchton Dep., May 4, 1982, and was repeated in the oral argument before the Fifth Circuit in the present action, Tr. of Argument, May 8, 1985, at 7.

teaching 'tailored to the principles' of a particular religious sect." Jur. Stat. Supp. App. B5-7.

The Fifth Circuit affirmed. 765 F.2d 1251 (5th Cir. 1985). The Court of Appeals (per Jolly, J.) held that the "intended effect [of the law] is to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief." *Id.* at 1257. The entire Fifth Circuit then decided not to rehear the case *en banc*, but Judge Gee, joined by six other judges, chided the majority for relying on "visceral knowledge" about the law's intent and argued—although appellants had not done so—that the stated secular purpose was alone sufficient to redeem the Act. 778 F.2d 225, 227 (5th Cir. 1985).

This Court noted probable jurisdiction on May 5, 1986. 106 S. Ct. 1946.

SUMMARY OF ARGUMENT

The Establishment Clause prohibits a State to intend or to achieve approval or disapproval of a particular religious belief, or excessively to entangle government and religion. By its enactment of the Creationism Act, Louisiana violated this prohibition.

The words in the Creationism Act denote endorsement of a religious belief. The legislative history of the statute—and the history of Fundamentalist attacks on the theory of evolution—only fortify the conclusion that the statute's design is to promote religion. Forbidding instruction in the theory of evolution without "balanced treatment" for this religious belief cannot serve the avowed legislative purpose of academic freedom. The Act instead undermines academic freedom.

The law's inevitable effect is that the children of Louisiana (and of other states that may adopt the statute), if they are taught anything about the development of the species, will be faced with an ominous—and wholly gratuitous—contrast be-

tween one scientific theory and one particular religious belief. The year-by-year, school-by-school, and teacher-by-teacher decision-making on whether and how to imbue "creationism" into the sciences and humanities promises continuing anguish in the educational community and assures inordinate involvement of religious groups in the affairs of government.

No trial is needed so to conclude. Testimony cannot change what the statute means, nor rewrite the history of its enactment. The putative "evidence" that appellants submitted below—*post hoc* affidavits by "expert" theologians, biologists, and a school administrator—raised no triable issue of material fact. The courts below properly granted summary judgment.

ARGUMENT

I

THE CREATIONISM ACT VIOLATES THE ESTABLISHMENT CLAUSE

The First Amendment, coupled with the Fourteenth Amendment, provides that the Nation and the States "shall make no law respecting an establishment of religion." U.S. Const., amend. I; *see Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). This provision's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). The Establishment Clause seeks to achieve a neutrality between government and religion which avoids "a fusion of governmental and religious functions or a concert or dependency of one upon the other." *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963).

No provision of the Constitution so firmly assures the essential freedom of the individual as does the Establishment Clause. The provision recognizes that choices about the ultimate meaning of life must be made in the private recesses of the conscience and not in the earthly controversies of political

power. Were every person in this country of the same faith, the Establishment Clause would serve as a powerful expression that humans must decide their relationship to God, not at the bidding of the state, but at the calling of the soul. That we are a Nation of many religions does not alter this basic function of the Clause, it only enhances the need for vigilance against state manipulation of belief.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). "Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects." *McCollum* v. *Board of Educ.*, 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring).

It is, therefore, "much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968). A state's choices, instead, "must have a secular legislative purpose," must have a "principal or primary effeet" that "neither advances nor inhibits religion," and "must not foster 'an excessive entanglement with religion.' " *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted); *accord Thornton* v. *Caldor, Inc.*, 105 S. Ct. 2914, 2917 (1985).

The Creationism Act fails each of these tests.

A. The Purpose of the Creationism Act Is To Endorse a Religious Belief

A state violates the Establishment Clause when it intends by its laws to advance or to inhibit a religious belief. *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2492-93 (1985). Discerning legislative intent requires no psychoanalysis of the legislature, no dependence on visceral feelings about the lawmakers' motives. A legislature manifests the purpose of any law by the statutory

language, by the legislative history, and by the social context that occasioned enactment. *Lynch* v. *Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring); *see Wallace* v. *Jaffree, supra*, 105 S. Ct. at 2490-91. These conventional tools of statutory interpretation are more than adequate to expose the non-secular purpose of the Creationism Act.

1. The Creationism Act Expressly Endorses a Religious Belief

The unadorned words of the Creationism Act betray its religious purpose. The ordinary meaning of the word "creation" presupposes a supernatural Creator: "the act of bringing into existence from nothing the universe or the world or the living and nonliving things in it." *Webster's Third Int'l Dictionary Unabridged* 532 (1981). The ordinary meaning of the statute's synonym for the belief in creation—"creationism"—so attests: "a doctrine or theory of creation holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing." *Id.* By mandating instruction in "evidences *for*" this doctrine, the statute expresses the legislature's intent to require instruction in a *belief* that a Supreme Being made the universe.

Such is apparent from the statute's oxymoronic marriage of "creation" and "science." By definition, science does not rely on the supernatural. Science observes and classifies data, posits an explanation of that data, and then continues to test the explanation for error with other available data. Curiosity, not reverence, characterizes this process: Scientific theory knows no final answers, only explanations that have not been disproved. To be sure, in science as elsewhere, "[t]he history of scholarship," as Chief Justice Hughes put it, "is a record of disagreements." Address, May 7, 1936, *in* 13 Am. Law Institute, *Proceedings* 61, 64 (1937). But to be the subject of scientific dispute, a theory must be subject to scientific inquiry.

"Creation-science" forecloses scientific inquiry. The unifying principle of "creationism" is not the law of nature, but

divinity. A divine explanation of natural data is not subject to experiment, it cannot be proved untrue, it cannot be disputed by any human means. The theory of "creationism" necessarily rests on the unobservable; it can exist only in the ambience of faith. Faith—belief that does not rest on logic or on evidence—has no role in scientific inquiry. "Creation-science" thus is not a scientific theory about nature in search of inconsistent data, but a faith in a Creator in search of consistent data. By singling out a belief in a Creator from among the many creeds this Nation welcomes, the Creationism Act endorses that faith.

But the statute does even more. The statute's explicit juxtaposition of "creation-science" and "evolution-science" as contrary "models" of "origins" signifies support for the *particular* version of creation in Genesis. The ordinary meaning of "evolution" is "a process of continuous change from a lower, simpler or worse condition to a higher, more complex or better state." *Webster's Third Int'l Dictionary Unabridged* 789 (1981). Evolution thus deals not with origin but with change, not with beginnings but with development. No disharmony exists between a scientific theory of change and a belief in creation (evolution can be a means by which a Creator effects change)—unless the belief, as in a literalist's reading of Genesis, is that no change occurred, that all things were functionally complete when created. Hence, by communicating an inconsistency between "evolution-science" and "creation-science," the Creationism Act intends to send the message that the creation about which teachers must instruct is the one the Bible describes.

Extrinsic aids to the meaning of the term "creation-science" remove any doubt that its content is Biblical. That the legislature so intended is evident in the parallels between Genesis and every description of "creation-science" in the legislative history. The intention appears in the Genesis-derived explanation of "creation-science" in the Ellwanger "model bill," *see* p. 16, *supra*, removal of which, as its sponsor observed, expressly was "not intended to try to gut it [the model bill] in any way" (JA E432). The legislative message is plain in the absence of

any secular works on the topic, in the Biblical content of the only works in existence at the time of enactment, and in the legislators' decision to delete the prohibition on use of Biblical writings in "creation-science" instruction. The Biblical meaning of "creation-science" shows in Senator Keith's reliance in advocating his bill on the Arkansas statute, with its Biblically-inspired definition of the term, and in the Senator's reliance on authorities, such as the Creation Research Society, which swear allegiance to Genesis as literal truth. And the intended meaning is apparent, too, from the perception of those charged with implementing the law—the school superintendents—that "creation-science" means Genesis.

For a government to require instruction in a belief that a Creator conceived the universe—and especially in a belief in the truth of Genesis—offends the Establishment Clause. Belief is the essence of "religion." Nothing is more central to the concept of religious belief than attitudes about basic questions of human existence "upon which all else is ultimately dependent," *United States* v. *Seeger*, 380 U.S. 163, 166 (1965), including "one's views of his relations to his Creator," *Davis* v. *Beason*, 133 U.S. 333, 342 (1890). "[T]he place of the Bible as an instrument" of fostering a particular religious belief on such questions "cannot be gainsaid." *Abington School Dist.* v. *Schempp*, *supra*, 374 U.S. at 224. The Constitution forbids a state to "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961). A government decision that is meant to convey a message singling out for instruction the "evidences for" a belief in a Creator, and specifically the Creator of whom the Bible speaks, reflects an intention to aid a religious belief and therefore violates the Constitution. *See Wallace* v. *Jaffree*, *supra*, 105 S. Ct. at 2488-90; *id.* at 2496-97 (O'Connor, J., concurring).

Appellants' revisionist approach to the Creationism Act cannot wish this conclusion away. According to appellants now, such longstanding tenets of "creationism" as "creation

from nothing," the "relatively recent inception" of the universe, and the occurrence of a "worldwide flood," are "misconceptions" and "incorrect illustrations" of "creation-science" (Br. 14 n.52, 40). The subject properly defined, appellants insist, entails study of the "abrupt appearance" of life and the universe in "complex" or "highly developed" form, without reference to the "sources or causes" of the appearances (*Id.* 15, 17). Appellants say that "creation-science" thus merely happens to coincide with the religious belief in creation, in much the way, they claim, that evolution coincides with other religious beliefs (*Id.* 22-24, 47).

The argument is untenable afterthought. The "misconceptions" appellants allege comprise the only information about "creation-science" in the legislative record. Were the view of "creation-science" which appellants portray here so obvious, surely the legislature would have unburdened itself of error and would have known to place appellants' new language where different words—words like "creationism"—appear in the statute. But the Act makes no mention of "abrupt appearance," and the voluminous legislative history whispers not a word of the definition appellants now identify. Nor is appellants' definition evident in any of the prior efforts to define "creation-science" for the classroom or elsewhere.[4]

That the meaning of "creation-science" changes with its litigation fortunes only attests to the futility of attempting to impart secular content to an inescapably religious subject. To say, for instance, as appellants now do (Br. 17), that a "science" may consist of a conclusion of "abrupt appearance" without any inquiry into the "sources and causes" of that appearance is to contradict the very purpose of "science."

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4 *See, e.g., Crowley* v. *Smithsonian Institution*, 636 F.2d 738, 739 (D.C. Cir. 1980); *McLean* v. *Arkansas Bd. of Educ.*, *supra*, 529 F. Supp. at 1264-65 (E.D. Ark. 1982); *Hendren* v. *Campbell*, *supra*, No. S577-0139 (Ind. Super. Ct. Apr. 14, 1977); W. Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 Harv. J. Law & Pub. Pol. 125, 166-67 (1979); Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L.J. 515, 554 (1978).

Science *demands* inquiry into the "sources and causes" of a particular phenomenon, and *insists* upon an explanation of those "sources or causes" in empirical terms. If an "abrupt appearance" cannot be explained by reference to nature, then the only "inference" that a teacher could draw—and the only "inference" the legislature could have intended the teacher to draw and the student to understand—is an inherently unscientific supernatural answer: God did it.

And, indeed, even here, even in the controllable circumstances of litigation, even in a presentation of "creation-science" scrubbed as thoroughly as possible to erase religion, appellants cannot escape resort to faith. Thus, appellants' creationists assert that more complex species "cannot originate by naturalistic means." (Br., App B, A15.) Rather, they say, "creation-science" presumes a "Designer" who "must know infinitely more science than we shall ever know" and who carefully crafted humanity "start[ing] off with a few simple examples and, learning from them, introduced new and improved species." (Br., App D, A46.) The evidence of such a Designer, the creationists explain, "is intrinsically non-gradualist in its emphasis [that is, as in Genesis, no change occurred] and relies strongly on catastrophic events occur[r]ing in nature [the Flood]." (Br., App B, A26-27.) And the study of this "science," we are told, may be likened to an examination of a printed page, from which a person may infer an origin by "intelligent design and engineering knowhow" which created what we see "from the 'outside'." (Br., App B, A22.) The discipline, in other words, does not (because it cannot) explore for the Designer, and looks to faith to hold that the Designer exists.

Louisiana's intent to require instruction in such faith is not a mere coincidence of a secular subject with a religious belief. Doubtless the Constitution does not proscribe harmony between state acts and religious tenets: A lesson on the Crusades does not become religious instruction simply because some people believe them to be holy, nor is a criminal code a faith simply because the code prohibits acts that some believe are

sins. Hence, instruction that fossil records may belie the theory of evolution, or that nature may indicate the occurrence of worldwide catastrophe, does not alone convert the classroom into a forum for purveying religion.

The constitutional defect in the Creationism Act is not that the law requires instruction about facts which coincide with a religious belief, but that the law requires instruction in one religious belief as the unifying explanation of facts. The unifying concept in the Act is not a secular topic such as biology, chemistry, art, phonics, or literature which is familiar to the elementary and secondary school curricula. The statute directs, instead, that teachers identify, organize, and teach facts and inferences supporting a specific belief—"creation"—and that, absent such instruction, those teachers may not teach facts and inferences which are legislated to be *in*consistent with that belief. Hence, the religious content is not coincidental to the Creationism Act, but central to the statutory scheme.

Appellants' argument thus dwindles to a claim that a legislative intent to require instruction in a religious belief (or to forbid instruction inconsistent with that belief) is no more offensive to the Constitution than a pledge of allegiance that mentions God or a holiday display that features a creche (Br. 27-29). A government action that acknowledges God is, however, profoundly different from government action that manipulates belief or disbelief in God. Our "institutions presuppose a Supreme Being," *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), but they also presuppose a free mind on matters of religion. That a Nation, while acknowledging God, elects to withdraw government from religion is no paradox, for the very decision to withdraw is praise to the sanctity of the deeply personal relationship that inheres in the concept of God. Disestablishment of religion was not intended to keep from society that religion exists, but to assure that the individual, not the government, makes the choice on whether or how to be religious. *See Engel* v. *Vitale*, *supra*, 370 U.S. at 432, 435.

The Creationism Act intentionally intrudes on that choice. It is no answer, as appellants contend (Br. 27), that the legislature meant to have "creation-science" taught in a "non-worship" context where instruction would be "about," not "in," the Bible. The Act does not provide, for example, that a social-science teacher ought to acknowledge the numerous and varied ways—from the Hindu to the Hopi, from the Christian to the Confucian, from the pantheist to the deist, from the Islamic to the Buddhist—in which different religions have explained the origins of life and the universe. The statute instead selects one single belief—faith in a divine Creator—which is embraced by some and offensive to others, and gives that belief equal weight in the classroom with a scientific theory. To require public schools to marshal "evidences" and "inferences" in service of one religious belief, or to impose an embargo on a scientific theory that Fundamentalists dislike, is not to use religious works "for the teaching of secular subjects," *Abington School Dist.* v. *Schempp*, *supra*, 374 U.S. at 224, but to place "the power, prestige and financial support of government . . . behind a particular religious belief," *Engel* v. *Vitale*, *supra*, 370 U.S. at 431.

In our society, government is not permitted to intend to instruct a child in religion—not because religion is false, but because it is not the government's job to promote a religious form of truth. And, indeed, in every case in which government has attempted directly or indirectly to influence religious beliefs through the public schools, this Court and other lesser courts have invalidated the state action.[5]

The Creationism Act merits the same treatment.

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5 *See, e.g.*, *Wallace* v. *Jaffree*, *supra*, 105 S. Ct. at 2490, 2493 (public school period for silent voluntary prayer); *Stone* v. *Graham*, 449 U.S. 39, 41 (1980) (per curiam) (public school display of the Ten Commandments); *Epperson* v. *Arkansas*, *supra*, 393 U.S. at 107-09 (ban on evolution theory in public schools); *Abington School Dist.* v. *Schempp*, *supra*, 374 U.S. at 224 (Bible readings in public schools); *Engel* v. *Vitale*, *supra*, 370 U.S. at 430 (prescribed prayer for public schools); *McCollum* v. *Board of Educ.*, *supra*, 333 U.S. at 231 (release of students from public schools for religious instruction); *Malnak* v.

2. The Creationism Act Lacks a Legitimate Secular Purpose

That the Creationism Act professes "academic freedom" as its secular aim does not rescue the statute from the reach of the First Amendment. To be coy is not to be constitutional. The Constitution nullifies "sophisticated as well as simple-minded" efforts to elude its provisions, *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939), and a "surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message" is as much a violation of the Establishment Clause as is a naked one, *Lynch* v. *Donnelly*, *supra*, 465 U.S. at 680. Consequently, "an 'avowed' secular purpose"—such as the one the Creationism Act purports to advance—"is not sufficient to avoid conflict with the First Amendment." *Stone* v. *Graham*, *supra*, 449 U.S. at 41; *see Roemer* v. *Board of Pub. Works*, 426 U.S. 736, 747 (1976) (opinion of Blackmun, J.); *Abington School Dist.* v. *Schempp*, *supra*, 374 U.S. at 223-24.

This is especially so when the statute flouts the very purpose it purports to uphold. The ordinary meaning of "academic freedom," as the Fifth Circuit observed below, "embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment." 765 F.2d at 1257. Informing this principle is that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969). Teachers "cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them," Justice Frankfurter wrote, for they "must have the freedom of responsible inquiry,

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Yogi, 592 F.2d 197, 199 (3d Cir. 1979) (use of public schools for instruction in transcendental meditation); *Daniel* v. *Waters*, *supra*, 515 F.2d 485, 489 (6th Cir. 1975) (public school instruction in Genesis); *McLean* v. *Arkansas Bd. of Educ.*, *supra*, 529 F. Supp. at 1272 (public school instruction in "creationism"); *cf. Williams* v. *Board of Educ.*, 388 F. Supp. 93, 96 (S.D. W. Va.), *aff'd mem.*, 530 F.2d 972 (4th Cir. 1975) (effort to ban textbooks offensive to one faith); *Davis* v. *Page*, 385 F. Supp. 395, 402 (D.N.H. 1974) (effort to forbid instruction in health course offensive to one faith).

by thought and action, into the meaning of social and economic dogma." *Wieman* v. *Updegraff*, 344 U.S. 183, 196 (1952) (concurring). Dedication to the protection of this freedom means promotion of a "robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967) (citation omitted); *see Healy* v. *James*, 408 U.S. 169, 180-81 (1972).

The Creationism Act is the antithesis of academic freedom. Teachers who once were free to exercise their professional judgment to teach *any and all* facts about the universe are now not at liberty to do so. The teachers now must choose: They must teach nothing about the subject, or they must teach two purportedly conflicting "sciences." The teacher is not free to use his or her judgment about how much weight should be given to each of these theories, but must assure "balanced treatment." A teacher is not free to teach other than the two "models," and must segregate facts as "evidences for" one or the other. Nor are teachers free to confine this "balanced treatment" to the sciences, for teachers must do the same in the humanities as well. The statutory freezing of classroom thought, and hence the invasion on academic freedom, is total.

Appellants' effort to clarify the purportedly secular purpose—their claim that the statute (without saying so) is intended to advance the *students'* "academic freedom" to receive "additional scientific information" (Br. 36, 45)—makes no sense. To inject the State between the students' right to learn and the teachers' right to teach—to imprison the tutor to set the pupil free—is to make a mockery of academic freedom. No Louisiana law impeded instruction in *any* scientific information before the Creationism Act was enacted; to regard the law as merely opening the schoolhouse to information is, therefore, "inconsistent with the commonsense presumption that statutes are usually enacted to change existing law." *Wallace* v. *Jaffree*, *supra*, 105 S. Ct. at 2492 n.48. Common sense shows, too, that the Creationism Act does not rationally advance even the students' right to receive "additional information": Under

the Act, student receipt of "additional" information depends wholly on whether the students receive information about the theory of evolution. "Creation-science" is to appear in the classroom only to "balance" instruction in the theory of evolution.

Therein lies the purpose of this law—and appellants, in the end, so acknowledge. The constitutionally-required "neutrality" between "religion and nonreligion" of which this Court has spoken, say appellants, "is precisely what balanced treatment produces and precisely what exclusive instruction in evolution thwarts" (Br. 45). Appellants thus confirm what the legislative history on the meaning of "academic freedom" reflects: that the Creationism Act was intended to assure, not that students receive scientific information, but that instruction in the supposedly irreligious theory of evolution be met at all turns by the religious theory of creation. The State *intended* to "neutralize" ostensibly "unbalanced" instruction in a scientific theory that is silent on the existence of God, and hence thought to inhibit religion, with a putative "science" that relies on God, and hence is thought to promote religion.

Louisiana thus legislated religion—the exact opposite of the "clearly secular" purpose the Constitution demands. To be neutral does *not* mean to play umpire in a match for which the State itself selects two contestants; it means to abstain from participation in whatever contests arise. Public school instruction in the scientific theory of evolution is constitutionally neutral precisely because the theory—like reading, writing, arithmetic, chemistry, and physics—is not taught in order to affirm or deny divinity. "Doctrines and faith are not inculcated or advanced by neutrals." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 618.

A constitutionally neutral subject does not become partisan simply because one or more sects believe the subject collides with their faith. "[T]o restrain the profession or propagation of principles on supposition of their ill tendency," the Virginia forerunner of the Establishment Clause said, "is a dangerous

fallacy which at once destroys all religious liberty." 12 Hening's Stat. 84, *quoted in Reynolds* v. *United States*, 98 U.S. 145, 163 (1878). Consistent with this teaching, "the state has no legitimate interest in protecting any and all religions from views distasteful to them." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 505 (1952). Because Louisiana intended such protection, the Creationism Act is invalid.

3. The Creationism Act Was Intended To Endorse a Religious Belief

Laws are not written in a vacuum. Laws are written to repair specific defects, to allocate specific resources, to prohibit specific mischief. To know the evil at which a law is directed is to know what a law means. And in deciding what a law means, in discerning the problem that a law is meant to solve, a court may rely on the social context which engendered the law. *Wallace* v. *Jaffree*, *supra*, 105 S. Ct. at 2491-92 & n.49; *see Lynch* v. *Donnelly*, *supra*, 465 U.S. at 679; *id.* at 690-92 (O'Connor, J., concurring). There are times, as Justice Holmes suggested, when "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

Epperson v. *Arkansas*, *supra*, 393 U.S. 97 (1968), shows how. In that case, as in this one, a State outlawed the teaching of evolution (albeit there in all circumstances). *Id.* at 99 & n.3. There, as here, the statute was passed with awareness of recent judicial rulings, *id.* at 109 & n.17, and so there, as here, the statute did not use such words as "religion," or "the Bible," or "God." There, as here, the State asserted a secular purpose in its control of school curricula. *Id.* at 107. There, as here, however, the outcry prompting the law was that "atheists favor evolution," and that the theory was "contrary" to biblical teaching and "undermine[d] the faith" of children. *Id.* at 108 n.16. There, as here, the "overriding fact" was that the law "selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine." *Id.* at 103. There, holding that "[t]here is and can be no doubt that the First Amendment does not permit the State to require that teaching

and learning must be tailored to the principles or prohibitions of any religious sect," this Court adjudged the statute unconstitutional. *Id.* at 106. The same result is warranted here.

It cannot be denied that the theory of evolution is and has been the principal target of those who believe in the inerrancy of Genesis. Were there no legislative history to enlighten the reasons the Creationism Act became law, had its supporters never said a word of the evils to which their proposal was addressed, the undisputed chronicle of Fundamentalist hostility to evolution, coupled with the repackaging of Genesis as "creation-science," would be sufficient to expose the religious purpose of the Creationism Act. That Louisiana had never before (nor has it since) deemed it appropriate to legislate what is or is not a "science," and that the extensive legislative history here so overwhelmingly displays antagonism to evolution as the animating force behind the law, only confirm the obvious. *See Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (substantive deviations, together with social background and legislative history, indicative of legislative intent).

Appellants here cannot make up their minds on the legislative history. They urge that the "official legislative record"—and "particularly a complete record such as Louisiana's" —ought "not be disregarded" (Br. 34-35), yet they brand as "misconceptions" every description of "creation-science" in that record (*id.* 14 n.52, 40). They quote or cite Senator Keith over twenty times to support their view of the law (*id.* 37-42), yet then they insist that his views are "not controlling or even indicative of the legislative purpose" (*id.* 43). They say that Senator Keith's original, and plainly religious, version of the statute is only of "marginal relevance" here (*id.* 41), but they rely on the hearings on that bill to back their claims (*id.* 37-38 & nn.176-77), and they never explain the objects the earlier bill intended which the Creationism Act does not. And appellants invoke the deletions from the definition of "creation-science" in the "model bill" as evidence of constitutionally proper purpose (*id.* 40), yet they never say *how* the purpose thereby

changed, and they label "incorrect" the ruling striking down the Arkansas statute, which contained the more inclusive definition of the term (*id.* 45).

Appellants' ambivalence mirrors the inseparability of "creation-science" and creation-religion. Simply calling something a science cannot make it so, anymore than giving a faith an alias can hide its religious content. Religious hostility to evolution theory prompted the Creationism Act, and "no legislative recitation of a supposed secular purpose can blind" this Court to that fact, *Stone* v. *Graham*, *supra*, 449 U.S. at 41-42. "[N]o consideration of the second or third criteria [for assessing the conformity of state action with the Establishment Clause] is necessary if a statute does not have a clearly secular purpose." *Wallace* v. *Jaffree*, *supra*, 105 S. Ct. at 2490. The Creationism Act is unconstitutional because it lacks such a purpose.

B. The Effect of the Creationism Act Is To Endorse a Religious Belief

"[T]he propriety," if any, "of a legislature's purposes may not immunize from further scrutiny a law which . . . has a primary effect that advances religion." *Committee for Pub. Educ.* v. *Nyquist*, 413 U.S. 756, 774 (1973). The effect of a law means the impact the law is likely to have on those to whom the law is addressed, which here is primarily concerned "with the effect on the minds and feelings of immature pupils," *Wallace* v. *Jaffree*, *supra*, 105 S. Ct. at 2495 n.9 (Powell, J., concurring). The Creationism Act is likely to produce one of two possible effects, and neither accords with the First Amendment.

One possibility—a complete quarantine on all information about the origins and development of the universe—impresses on young students that the very subject is too holy for the classroom. The blackout on facts conveys the message that a conflict exists between science and religion which only religion can properly address. This effect will elevate religion among some and cause resentment toward religion among others.

The other possibility brings the conflict into the classroom. By creating a specious rivalry between two "sciences," the statute inevitably compels a choice. The choice is between God and no God, between a collection of "evidences" that by definition support divinity and a scientific theory that by definition is neutral on the supernatural. The legislators' debate—that, "[i]f there is a God" then "that will be a fact," and "[i]f [H]e does not" exist, then that will be a "scientific fact as well" (JA E561-62)—is to enter the classroom. Young students are to decide whether their faith (or lack of it) can meet the test of science. And with creationism "balancing" every course that deals "in any way" with the origin of the universe, the decision confronts the student every day: A high school senior's calculation of the speed of light, for instance, or an eighth-grade lesson on how the earth forms oil, or a third-grade rock collection, or a sophomore's perception of what happens in the crucible in the chemistry lab, will all acquire meaning in relation to the students' ultimate religious beliefs.

The result is to debase religion. Appellants rush to assert an ostensible "crisis" in the widely-accepted theory of evolution—the theory's alleged defects, it seems, comprise the whole of "creation-science"—yet in doing so appellants bypass the two-way street their argument paves. The Creationism Act requires "balanced treatment" of putative "sciences," but it cannot prevent one "science" or the other from being called silly. If a divine explanation of the universe may be taught, then it, too, may suffer "crisis"; it, too, may be falsified; it, too, can be dubbed, as the creationists before the legislature dubbed evolution, a "myth." "Such indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism." *Grand Rapids School Dist.* v. *Ball*, 105 S. Ct. 3216, 3224 (1985).

The risk inheres in the exercise. Consider, for example, fossils in a Texas riverbed that appear to contain contemporaneous footprints of both dinosaurs and humans. In the ordinary classroom, such a phenomenon might be used to teach what fossils are, or about how dinosaurs walked, or perhaps even to wonder whether man ever strolled hand-in-paw with a brontosaurus. In a classroom under the Creationism Act, however, the fossils—long regarded by creationists as data supporting creation—would have been classified as "evidences for" a specific belief in creation, thereby confirming for the child who believes in Genesis that his or her faith is "correct." But suppose that, later, improved technology demonstrates—as it recently has done—that the fossil tracks once thought to be human are in fact those of dinosaurs. Upon being instructed in this development, the child inevitably will perceive that his or her faith has now been disproven and is therefore "incorrect." *See generally* "Fossils of 'Man Tracks' Shown To Be Dinosaurian," *N.Y. Times*, June 17, 1986, at C3, col. 1.

Powerfully influencing whether the child's faith is proved or disproved will be the performance of individual teachers. "[A] textbook's content is ascertainable, but a teacher's handling of a subject is not." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 617. An inescapable consequence of the Creationism Act is to allow an instructor to decide whether facts are "evidences for," and to build a case for, one or the other legislated "sciences." And surely if the creationists whom the legislature heard, and the school superintendents throughout the State, suffer the alleged "misconception" that "creation-science" parallels Genesis, then teachers may do so as well. The very novelty of "creation-science," and the allegedly "incorrect" but widespread perceptions about it, greatly increase the potential for impermissible fostering of religion, or its derogation. *See id.* at 619; *cf. Meek* v. *Pittenger*, 421 U.S. 349, 369-70 (1975) (it is error to rely "entirely on the good faith and professionalism of the secular teachers").

No matter what the legislature may have intended, therefore, the effect of the Creationism Act is needlessly to contrast

science and religion and to defeat the aims of each. The statute promises no secular effect to overcome this primary consequence. For this reason alone, the law violates the First Amendment.

C. The Creationism Act Excessively Entangles the State and Religion

The Creationism Act threatens improperly to merge government and religion in statewide efforts to implement the statute and in local curricula decisions.

That the only "creationism" textbooks cited in the legislative record are the products of such organizations as the Institute for Creation Research, and that religion pervades all these existing materials, promise excessive entanglement of religious institutions and the government in the preparation and editing of school texts. The statute clearly contemplates that such will occur: Careful to limit other sections of the law to public institutions, the legislature chose not to exclude sectarian teachers from membership on the statewide panel established to assist local boards in implementing the Act. The statute could not do so: Because membership on the board is confined by law to "creation-scientists," members of the Fundamentalist organizations that are the authoritative sources for "creation-science" are the obvious (and to judge from the legislative record, the only) persons to fill that panel.

But there is more. That church groups head the list of those who inquired of school superintendents about plans to implement the Creationism Act is a signal of the entanglements to come in the annual decisions of sixty-six local boards on whether and how to teach "creationism." The potential exists for these groups to participate in and influence the development of the curriculum, to monitor its implementation, and to assess and adjust the "balance" afforded the subject by individual teachers. The pressures on the local boards to "neutralize" allegedly "humanistic" instruction—and to do so within existing budgets (the legislature appropriated no funds to

implement the statute)—will assure not only political divisiveness but direct involvement of religious groups in public school curricula. This, without more, creates entanglements the Constitution strives to avoid. *Cf. Meek v. Pittenger, supra*, 421 U.S. at 370-72 (Constitution seeks to prevent state involvement in religious schools); *Lemon* v. *Kurtzman, supra*, 403 U.S. at 622-25 (same).

The genuine threat of undue involvement by religious organizations in the administration of the Creationism Act is a byproduct of the statute's non-secular purpose and effect. Political power sufficient to achieve an unprecedented intrusion into the public school curriculum is capable of securing the full promise of that achievement, despite the fusion of government and religion which may ensue. The Establishment Clause bridles such power, and requires invalidation of the Creationism Act.[6]

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6 We note appellants' reliance (Br. 29-32) on what they call the "historical test" of *Marsh* v. *Chambers*, 463 U.S. 783 (1983). There, this Court upheld the constitutionality of a practice (opening a legislative session with a prayer) which was widely accepted when Congress and the States adopted the First Amendment. *Id.* at 786-91. Appellants argue that, because the Framers of the Bill of Rights frequently acknowledged the Creator, the Framers could not have intended to forbid public school instruction in the existence of a Creator. Appellants neglect their history: Public schools—let alone the theory of evolution or the concept of a "creation-science"—were unknown when the Bill of Rights was adopted, *see Abington School Dist.* v. *Schempp, supra*, 374 U.S. at 236 n. 5 (Brennan, J., concurring), so the Framers could hardly have contemplated accepting as lawful a ban in those schools on science teaching not coupled with religious instruction. If history teaches anything of relevance in this case, the lesson is that the courts have invariably rejected efforts to infuse public schools with religion. *See supra* note 5.

II

THE COURTS BELOW PROPERLY GRANTED SUMMARY JUDGMENT

Rule 56(c), Fed. R. Civ. P., provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986) (emphasis in original).

The existence of purportedly "uncontroverted affidavits" is no bar to summary judgment. There is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2553 (1986) (emphasis in original). Rather, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citation omitted).

There is nothing to try in this case.

The motion for summary judgment here rested on an affidavit which set before the district court genuine copies of the Creationism Act, the formal legislative history of the Act (including the exhibits presented at the hearings), the State Board's report on the survey of school superintendents, the Ellwanger letters to Senator Keith, and findings made in two other cases (including the Arkansas decision in *McLean*) on the background of attempts to place "creationism" in public

schools. Neither the authenticity of the statute and its history nor the facts found in the other cases are disputed in this action.

The dispute appellants want to litigate is what the statute means. Their affidavits—by persons who had nothing to do with enactment of the law or its implementation—contain conclusory declarations by self-described experts that "creationism" is a "science" and not a "religion." Appellants argue that a court must accept these conclusions as true (Br. 7-8), and must hold a trial on the purportedly factual issues "such as the definition [of the language in the statute], non-religious nature, scientific nature, and secular legislative purpose" (*id.* 10).

Appellants misconceive the role of a court. The meanings of words in a statute, as Chief Justice Stone once explained, "are 'clear cut' questions of law," the "decision of which is unembarrassed by any disputed question of fact or any necessity to draw an inference of fact from the basic findings." *Bingham* v. *Commissioner*, 325 U.S. 365, 371 (1945). A court's interpretation of the plain and ordinary definitions of those words, enlightened by their context and their history, control the decision, not a party's *post hoc* made-for-litigation recital of what the law may mean. *See Richards* v. *United States*, 369 U.S. 1, 9 (1962); *Jay* v. *Boyd*, 351 U.S. 345, 357 (1956); *see also* 2A Singer, *Sutherland Statutory Construction* § 45.05 (Sands 4th ed. 1984).

These principles are fully applicable in cases under the Establishment Clause. This Court has never ruled that a trial must be held to ascertain whether the purpose or effect of a *statute* is to advance or inhibit religion. To the contrary, even when a government practice (as opposed to legislation) is at issue, or even when the courts below held a trial, this Court's rulings show that the constitutionality of a state act is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch* v. *Donnelly*, *supra*, 465 U.S. at 694 (O'Connor, J., concurring); *see*, *e.g.*, *Stone* v. *Graham*, *supra*, 449 U.S. at 41-42; *Epperson* v. *Arkansas*,

supra, 393 U.S. at 107-09. Thus, in the case on which appellants primarily rely—*Board of Educ.* v. *Allen*, 392 U.S. 236 (1968) (Br. 11-12)—this Court did *not* (as appellants strangely continue to misstate) "revers[e] summary judgment" on grounds of disputed fact, but instead *affirmed* summary judgment that a law was constitutional. 392 U.S. at 238, 241. And this Court has likewise disposed of numerous other Establishment Clause cases without a trial.[7]

The courts below properly did so here. Movants amply sustained their burden to prove that the Creationism Act was intended to endorse a religious belief. It was incumbent upon appellants to come forward with some evidence (if any there be) to show otnerwise. They did not do so. Appellants instead asked the district court to put the parties and the judicial system through the same sort of burden and expense which the lengthy trial over the Arkansas statute occasioned—and which resulted in a ruling that the religious purpose and effect of that State's "creationism" law were apparent from the statutory language and the legislative history. *McLean* v. *Arkansas Bd. of Educ.*, *supra*, 529 F. Supp. at 1264.

No trial is needed here, nor in other states that may consider "creationism" laws. Much as the Creationism Act solicits children to decide their religion in a public school classroom, so, too, did appellants ask a federal court to decide that the scientific theory of evolution is wrong and that a religious belief in creation is right. The district court's refusal to hold a protracted trial on that issue was no error.

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7 *E.g.*, *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Larson* v. *Valente*, 456 U.S. 228 (1982); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977); *Committee for Pub. Educ.* v. *Nyquist*, *supra*, 413 U.S. 756 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973); *Lemon* v. *Kurtzman*, *supra*, 403 U.S. 602 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Engel* v. *Vitale*, *supra*, 370 U.S. 421 (1962); *Torcaso* v. *Watkins*, *supra*, 367 U.S. 488 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Zorach* v. *Clauson*, *supra*, 343 U.S. 306 (1952); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).

CONCLUSION

"Religion," Alfred North Whitehead wrote, "is the vision of something which stands beyond, behind and within the passing flux of ir mediate things." *Science and the Modern World* 275 (1925). The vision is, and must remain, in the eye of the beholder. The government is not, and must not be, permitted to manipulate the view. The Creationism Act does so.

The judgment below should be affirmed.

Dated: August 18, 1986

Respectfully submitted,

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